

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

SC085631

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

In the Interest of :

STATE OF MISSOURI
Ex rel. Tranda Wecker

Relators,

vs.

THE HONORABLE
Steven R. Ohmer,

Respondent.

BRIEF OF RESPONDENT

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Jurisdictional Statement

The Supreme Court of Missouri has jurisdiction to issue “[t]he extraordinary remedy of a writ of prohibition . . . in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy a excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.” (State Ex Rel Proctor v. Bryson, 100 S.W. 3d 775 @ 776 (Mo Banc 2003) and Missouri Supreme Court Rule 97.)

Statement of Facts

By order dated December 12, 2002, Respondent Judge Steven R. Ohmer rendered the lower court's "Findings, Conclusions and Judgment Terminating Parental Rights" (TPR) of Relator Tranda Wecker with respect to K.A.W. and K.A.W. (L.F. in Appeal No. ED 82488, pp. 103-162). Relator filed no post hearing motions and, on January 15, 2003, Relator filed a Notice of appeal to the Missouri Court of Appeals Eastern District. (L.F. in Appeal No. ED 82488 pp. 166-168) Relator did not "present to the [trial] court for its approval a supersedeas bond" before filing her appeal from the TPR. (Missouri Supreme Court Rule 81.09(a) and § 512.080(2) RSMo. 2000)

At no time, either prior to or after the filing of the Notice of Appeal did Relator ever request of the trial court that it set requirements for such an appeal bond or otherwise establish conditions for staying the execution and effect of its December 12, 2002 order (L.F. in Appeal No. ED 82488)

Similarly, at no time after filing the Notice of Appeal in Appeal No. ED 82488, did Relator submit an "application to file a bond . . . in the appellate court" (Missouri Supreme Court Rule 81.10 and § 512.090 RSMo. 2000). Nor did Relator otherwise request that the appellate court either set or remand the issue to the trial court to set "such terms with respect to a supersedeas bond as may be appropriate." (Missouri Supreme Court Rule 81.10) Relator has to this day, never

requested that either the trial court or any appellate court stay the execution and effect of Judge Steven R. Ohmer's December 12, 2002 "Findings, Conclusions and Judgment Terminating Parental Rights."

Rather than follow the prescribed procedural requirements for obtaining a stay of execution of the December 12, 2003 TPR pending appeal, Relator, on February 8, 2003, filed in the Missouri Court of Appeals Eastern District a "Motion To Stay the Adoption Proceeding Pending Review of Appeal" (See Appendix for Brief of Respondent, pp. A-1 through A-6)

The adoption proceedings that were the subject of Relators request for a stay are captioned "In the Interest of Kiara Amber Wecker and Kayara Amber Wecker" bearing Trial Court Cause Number 035-00069A. The underlying Petition for Adoption had been filed on January 28, 2003 and were pending on February 8, 2003. (Appendix to Brief of Respondent, pp A-7).

On March 21, 2003, the Guardian ad Litem for the children who were the subject of the adoption proceedings filed with the Missouri Court of Appeals Eastern District "Guardian Ad Litem's Memorandum Regarding the Status of Adoption" in which he concluded that "[e]verything is ready, and the adoption can be completed now, without delay." (Appendix to Brief of Respondents, pp A-8 thru A10) On April 3, 2003, the Adoption Petitioners in the adoption action filed a Memorandum of Adoption Petitioners in Opposition to Appellant's Motion for

Stay in which Relator was reminded of the provisions of Supreme Court Rules 81.09-81.10 relating to stays of execution pending appeal. (Appendix to Brief of Respondents, pp A-11 thru A15).

On April 15, 2003, the Missouri Court of Appeals Eastern District denied Relators motion to stay adoption proceedings pending review of the termination of parental rights order of December 12, 2002. (Appendix to Brief of Respondents, p. A16)

On April 18, 2003, the trial court issue an Order, Judgment and Decree of Adoption to the Adoption Petitioners and issued a Certificate of Adoption for each child in Trial Court Cause Number 035-00069A. (Appendix to Brief of Respondents, pp A17 thru A18).

Thereafter, by order dated September 8, 2003, Respondent was advised that Relator had filed a Petition for Writ of Prohibition in the Missouri Court of Appeals Eastern District requesting that Respondent be prohibited from “entering final orders necessary for the finalization of the adoption of K.A.W and K.A.W.” (Appendix to Brief of Respondents, pp A19 thru A24). In this Petition Relator, for the first time “contents [sic] that allowing K.A.W. and K.A.W.’s adoption to be finalized before her appeal is fully adjudicated is unconstitutional.” (Appendix to Brief of Respondents, p A23).

The Missouri Court of Appeals Eastern District was advised that the Adoption proceedings had been concluded on April 18, 2003 and presented with additional pleadings. Thereafter, by order dated September 22, 2003, Relator's Petition for Writ of Prohibition in the Missouri Court of Appeals Eastern District was denied. (Appendix to Brief of Respondents, p A25). This matter is now before this court with Relator requesting the same relief as was previously twice denied by the Court of Appeals.

Points Relied Upon

Relator's request for an order prohibiting Respondent from entering final orders in the adoption or requiring Respondent to set aside said orders if entered regarding K.A.W. and K.A.W. should be denied because:

- (A) The order of adoption was entered on April 18, 2003 and became final on May 18, 2003. The authority to enter such order was within the jurisdiction of Respondent and was not an abuse of discretion. Respondent had the power to act in the manner sought to be prohibited and Relator did not and has not suffered irreparable harm as a result of this order.
- (B) Relator's constitutional rights to substantive and procedural due process have not been violated. Rather, Relator has failed to exercise her rights to due process as provided in Supreme Court Rules 81.09 and 81.10 and §§ 512.080 and 512.090.
- (C) Relator has waived her claims of violation of her constitution rights since such claims were not raised at the earliest possible moment in the courts below.

Argument

A. The order of adoption was entered on April 18, 2003 and became final on May 18, 2003. Such order was within the jurisdiction of Respondent and was not an abuse of discretion.

As Relator has noted, this court stated in the case of *In the Matter of J.F.K.*, 853 S.W.2d 932, 934 (Mo banc 1993):

“An obvious prerequisite to any adoption is the consent of the natural parents or the involuntary termination of their parental rights. §§ 453.030, 453.040, RSMo 1986.”

In the instant case, although Relator never consented to the adoption of K.A.W. and K.A.W., her parental rights were terminated by Respondents order of December 12, 2002. Upon the issuance of the December 12, 2002 order terminating Relator’s parental rights, it was incumbent upon Relator, to obtain a stay of the execution and effect of that order if she so desired. If no such stay of execution was obtained, then those affected by such order could act in a manner consistent with its terms.

Despite a clear avenue for procedural relief pending appeal under Supreme Court Rules 81.09 and 81.10, and §§ 512.080 and 512.090 RSMo., Relator never sought to avail herself of relief in the form of a stay afforded by these well established procedural rules. Relator’s failure to follow these established procedures was also despite the fact that the availability of relief in the form of a

supersedeas bond, under Supreme Court Rules 81.09 and 81.10 and §§512.080 and 512.090 was brought specifically, to Relator's attention as early as April 3, 2003 when Adoption Petitioners filed their "Memorandum of Adoption Petitioners In Opposition to Appellant's Motion to Stay." No adoption order had been issued at that time and a stay of execution of the order terminating Relator's parental rights would have had the effect of removing Relator's authority to grant an adoption. §§ 453.030 and 453.040 RSMo.

Clearly, the posting of a supersedeas bond is required to stay the execution and effect of all civil judgements pending appeal in all civil actions except those specifically enumerated in §512.080.1. Since actions involving the custody of a child are not so enumerated, a supersedeas bond is required to effect such a stay. For example, a supersedeas bond was posted to stay the execution and effect of a joint child custody order in a divorce case. Green v. Perr, 238 S.W.2d 922 (Mo.App. 1951). In Green, the court stated:

"The recognized purpose of a supersedeas bond is to stay the execution or enforcement, pending the appeal, of any order or judgment which commands or permits some act to be done, or which is of a nature to be actively enforced against the party affected, where the case is not within the class of cases in which the appeal itself operates as a supersedeas. State ex rel. Dean v.

Douglas, 236 Mo.App. 1284, 165 S.W.2d 304. It is held, therefore, that an appeal from an order modifying a divorce decree with respect to the custody of a minor child comes within the purview of the statute, and does not stay the enforcement of the order in the absence of the giving of a supersedeas bond. This of course for the reason that the order is not self-executing, but requires something to be done to carry it into effect. State ex. rel. Gray v. Hennings, 194 Mo.App. 545, 185 S.W. 1153; Ex parte Porter, Mo.App., 203 S.W.2d 748; State ex rel. Burtrum v. Smith, 357 Mo. 134, 142, 206 S.W.2d 558, 563; State ex rel. Keith v. Wright, 230 Mo.App. 555, 560, 93 S.W.2d 1091,1093.”

[See also, Roussin v. Rousin, 792 S.W.2d 894 at 898 [18] (Mo. App.1990)]

In the instant case, Relator took no action under Missouri Rules of Civil Procedure 81.09 through 81.10 and §§ 512.080 through 512.090 to obtain a stay, pending appeal, of the effect and execution of the December 12, 2002 order terminating her parental rights. As a result, it was well within Respondent’s jurisdiction, authority, and discretion to grant an adoption, while the unstayed order terminating of parental rights was pending appeal. Currently, Respondent is

without jurisdiction to enter any order relating to either the termination of parental rights or the Decree of Adoption since:

1. The Judgment and Decree terminating Relator's parental rights was entered on December 12, 2002 and became final on January 11, 2003 and is currently on appeal, and
2. The Judgment and Decree of Adoption was entered on April 18, 2003 and became final on May 18, 2003. (Rule 81.05 Missouri Rules of Civil Procedure.) It has been held that once an order of a trial court becomes final, that court has "exhausted its authority and [is] . . . without jurisdiction to change, vacate or modify the judgment or to enter another judgment." (See State v. Randall 423 S.W. 2d 765 at 768[3] (Mo Banc 1968)).

B. Relator has waived her claims of violation of her constitution rights since such claims were not raised at the earliest possible moment.

The decree of adoption in the adoption proceedings captioned "In the Interest of Kiara Amber Wecker and Kayara Amber Wecker" bearing Trial Court Cause Number 035-00069A was issued on April 18, 2003.

Relator was well aware, not only of the fact that her parental rights had been terminated by Respondent's Judgment, but also of the fact that the

adoption proceedings were in progress and nearly ready to be finalized. This knowledge on the part of Relator is clearly evidenced by the fact that she on two occasions sought to have the adoption proceeding stayed by the Court of Appeals.

Relator's first request was made on February 8, 2003 when Relator filed in the Missouri Court of Appeals Eastern District a "Motion To Stay the Adoption Proceeding Pending Review of Appeal." A second and belated request was made in September of 2003 when Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals Eastern District requesting that Respondent be prohibited "entering final orders necessary for the finalization of the adoption of K.A.W and K.A.W. (Appendix to Brief of Respondents, pp A19 thru A24).

Never did Relator raise any constitutional questions with Respondent. Further, she did not raise a constitutional question in her February 8, 2003 Motion for Stay. In fact, no constitutional question was ever suggested until September of 2003 when Relator filed a Petition for Writ of Prohibition of the already completed adoption proceedings in the Missouri Court of Appeals.

It is well established that:

“A constitutional question must be raised at the earliest possible time consistent with good pleading and orderly procedure under the circumstances of a given case. Otherwise, it will be waived. *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612[1] (Mo. 1964).

“To raise properly a constitutional question, a party is required to raise it at the first available opportunity, designate specifically the constitutional provision claimed to have been violated, and state the facts showing the violation.”

City of Eureka v. Litz, 658 S.W.2d 519, 521[2, 3] (Mo.App. 1983).” [See *CREAMER v. BANHOLZER*, 694 S.W.2d 497 at 499 (Mo.App. 1985)]

The record shows that Relator has twice filed motions before the Missouri Court of Appeals for the Eastern District and on each occasion tried to obtain an order staying or prohibiting Respondent’s acting on petition for adoption. On the first occasion no constitutional provision was ever claimed to have been violated. On the second occasion, Relator did not “designate specifically the constitutional provision claimed to have been violated, and state the facts showing the violation.” No such was any such constitutional objection ever presented by Relator at the trial court level.

Since the alleged constitutional violation has not been raised with particularity at the earliest possible moment, the constitutional issue has not been preserved and should not be considered. [CREAMER v. BANHOLZER, 694 S.W.2d 497 at 499[9] (Mo.App. 1985)]

C. Relator's constitutional rights to due process have not been violated. Rather, Relator has failed to exercise her rights to due process as provided in Supreme Court Rules 81.09 and 81.10.

Relator appears to claim that Respondent has somehow set out to subvert her rights to appeal or rushed through the termination of parental rights and the adoption proceeding. Of course, under Chapters 211 and 453 R.S.Mo, permanent placement at the earliest possible moment for a child who has come with the jurisdiction of the court is declared to be of great interest to the state. This is clearly a legitimate state interest.

Nevertheless, as the legal file shows, the matters of the welfare of the children, the rights of the parents, and the permanent placement of the children through adoption or otherwise, were pending before the court below in some form from March of 2001 until April 18, 2003 when the decree of adoption was issued.

No disposition on TPR issue was made until December 12, 2002. In addition, the petition for adoption was filed on January 28, 2003 and all procedures

prerequisite to the adoption hearing had been completed well prior to March 21, 2003. Nevertheless, no adoption hearing was held or decree issued until April 18, 2003.

As the record on appeal shows, Relator was afforded full due process both procedurally and substantively. Relator essentially asserts that her failure to obtain a stay of execution of the December 12, 2002 judgment and decree constitutes a violation of her rights to procedural due process. As stated by the Western District Court of Appeals for Missouri in City of Richmond v. Suddarth, WD 61809 decided September 30, 2003:

“The legislative intent that a party have an opportunity for judicial review does not mean or imply that the party is excused from complying with the procedural preconditions of review . . . The right to appeal is purely statutory. [citing] *State v. Larson*, 79 S.W. 3d 891, 892 (Mo. Banc 2002)”[See Appendix for Respondent Brief, A-42]

The record shows treatment of the Relator in the manner that is consistent with her rights to due process. Relator has simply failed to fully utilize the due process that has been available to her and has attempted to utilize “work arounds.” Section 512.080 RSMo. states in plain English that the posting of bond as approved by the court “shall have the effect to stay the execution thereafter” of a judgment that is on appeal. Supreme Court Rule 81.09 states the same. Relator’s

appeal does not fall within the exceptions to the supersedeas bond requirements listed in 512.080(1). Therefore, under the maxim *expressio unius et exclusio alterius*, Relator was and is required to request and post a supersedeas bond to obtain a stay.

It also appears that Relator is also suggesting that a “fundamental right” has been infringed such that her rights to substantive due process has been violated. Of course, “[i]f a statute [or governmental action] implicates a fundamental right, the state must show a legitimate and compelling governmental interest for interfering with that right.” Gunderson v. HVASS, 339 F.3d 639, 643 (8th Cir 2003). Suffice it to say that the welfare of the children of this state who have come within the jurisdiction of its juvenile courts, by reason of neglect, abuse or otherwise, is a legitimate and compelling governmental interest.

Finally, Relator relies heavily on the Supreme Court of Michigan opinion issued in the case of In re JK, 661 N.W.2d 216 (Mich. 2003) (See Appendix for Brief of Respondent, A. 26) In that case the Michigan Supreme Court stated that:

“While that application [on appeal from an order terminating appellants parental rights] was pending, unknown to this Court, the family division of the circuit court engaged in the apparently unprecedented and extraordinary action of allowing the foster parents to adopt the child.”

* * *

“Because we find the evidence supporting termination to be insufficient, we vacate the order terminating the respondent's parental rights. We also take this opportunity to make clear what we believe to be obvious, that the circuit court is not permitted to proceed with an adoption following a termination of parental rights where the parent's appeal of that decision remains pending.”

However, it should also be noted that the State of Michigan has a statute (MCL 710.56(2) of the Michigan Probate code [see A. 40 of Appendix for Respondent Brief]) that specifically provides that:

“If a petition for rehearing or an appeal as of right from an order terminating parental rights has been filed, the court shall not order an adoption until 1 of the following occurs:

“ (a) The petition for rehearing is granted, and at the rehearing the order terminating parental rights is not modified or set aside, and subsequently the period for appeal as of right to the court of appeals has expired without an appeal being filed.

“ (b) The petition for rehearing is denied and the period for appeal as of right to the court of appeals has expired without an appeal being filed.

“ (c) The court of appeals affirms the order terminating parental rights.”

Missouri has no such restricting statute. Rather, § 453.011 RSMo. provides that cases “in which the termination of parental rights or adoption of a child is

contested by any person or agency” are to be expedited. Thereafter, the statute states that:

“3. It is the intent of the general assembly that the permanency of the placement of a child who is the subject of a termination of parental rights proceeding or an adoption proceeding not be delayed any longer than is absolutely necessary consistent with the rights of all parties, but that the rights of the child to permanency at the earliest possible date be given priority over all other civil litigation other than division of family services' child protection cases.”

This statutory language leaves discretion in the trial court to make decisions regarding whether an order of adoption should be issued pending appeal of an order terminating parental rights when no stay of execution has been sought as provided in Supreme Court Rules 81.09 and 81.10. Presumably, Missouri law allows a trial court to consider the following in making such a decision:

- a. Whether there is, or was, a procedure available, such as Missouri Rule 81.09-81.10 to the person appealing the termination of parental rights to obtain a stay of the judgment pending appeal and whether the appellate exercised that right;

- b. The length of time the children had been in the care of the adopting foster parents, the degree of bonding that has occurred, and the potential positive or adverse effects of approving the adoption;
- c. Whether the adoption affects the ability of the court to return the children to the natural parents if the termination is set aside;
- d. The potential effect on the children of being returned to the natural parents after having been adopted;
- e. The willingness of the adoptive parents to accept the possibility that the order of termination of parental rights will be reversed and that the adoption will be undone as a result.
- f. Whether the Adoptive Parents would likely continue as foster parents for at least a period of time even if the termination of the parental rights of the natural parent were to be reversed on appeal and the adoption set aside.

In any event, the ruling of the Michigan Supreme Court in In re JK, 661 N.W.2d 216 (Mich. 2003) does not apply to this or any other Missouri case since the Michigan law does not apply in Missouri. In fact, Missouri has made it clear that proceedings terminating parental rights and adoption proceedings are separate issues and may be reviewed separately by Missouri appellate courts. (In the Interest of D.S.G., 947 S.W.2d 516 (Mo.App.E.D. 1997))

Conclusion

In conclusion, Respondent had the authority and jurisdiction to enter the adoption order on April 18, 2003 and this order became final on May 18, 2003. The entry of this order was not an abuse of discretion. Respondent had the power to act in the manner now sought to be prohibited.

Relator has waived her claim of violation of her constitution rights to due process since she did not raise these claims at the earliest possible moment in either the trial court or her Motion for Stay filed on February 8, 2003 in the Missouri Court of Appeals Eastern District.

Further Relator's constitutional rights to substantive and procedural due process have not been violated. Rather, Relator has failed to exercise her rights to due process as provided in Supreme Court Rules 81.09 and 81.10 and §§ 512.080 and 512.090 RSMo.

Respectfully submitted,

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Certification of Compliance

Come now Counsel for Respondent and Adoption Petitioners certify that:

1. The Brief of Respondent complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidence.
2. This brief complies with Rule 84.06(b)
3. The number of words contained in the brief is approximately 4159 as listed by the word processor that the document was prepared on.
4. The disk has been scanned for viruses and found virus free.

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